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NOTE AND COMMENT

POWER OF THE U. S. SUPREME COURT TO ENFORCE JUDGMENTS AGAINST STATES.—In the year 1460, when the perogatives of sovereignty or at least of the Crown were asserted in England much more vigorously than they are today, "the Counseill of the right high and mighty Prynce Richard Duc of York, brought into the Parliament Chambre a writyng conteignyng the clayme and title of the right, that the seid Duc pretended unto the Corones of Englond and of Fraunce, and Lordship of Irelond, and the same writyng delyvered to the Right Reverent Fader in God George Bishop of Excestre, Chaunceller of Englond, desiryng hym that the same writyng myght be opened to the Lordes Spirituelx and Temporelx assembled in this present Parlement, and that the seid Duc myght have brief and expedient answere thereof." Whereupon the lords, apparently embarrassed by this extraordinary manifestation of confidence in them, declared "that the said writyng shuld be radde and herd, not to be answered without the Kyngs commaundement, for so moche as the mater is so high, and of soo grete wyght and poyse." When four days later the petition was again urgently presented "therupon incontynent all the seid Lordes Spirituelx and Temporelx went to the Kyngs high presence, and therunto opened and declared the seid mater, by the mouth of his said Chaunceller of Englond." The King was

graciously pleased to command the lords that they should "serche for to fynde in asmuch as in them was, all such thyngs as myght be objecte and leyde ayenst the cleyme and title of the seid Duc." And though the King's command could scarcely be regarded as indicating a judicial inquiry, the lords in their extremity "sent for the Kyngs Justices into the Parlement Chambre, to have their avis and Counsell in this behalf, * * * * sadly to take avisament therin, and to serche and fynde all such objections as myght be leyde ayenst the same, in fortefying of the Kynges right." Duke of York's Claim to the Crown, 5 Rot. Parl., 375, 1 Wambaugh's Cas. Const. Law, I.

Four and one-half centuries later the "sovereign state" of Virginia sued the "sovereign state" of West Virginia to recover a sum of money alleged to be due upon the agreement of West Virginia to assume its proportionate share of the debt of the old state of Virginia. The suit was brought in the Supreme Court of the United States, which after prolonged consideration rendered judgment for the plaintiff. No execution or other compulsory process was issued, however. But now after delays for various reasons and pretexts urged by West Virginia the court is compelled to face the problem of what if any compulsory powers it may exercise to enforce the judgment. In its opinion rendered April 22 of this year, the Supreme Court, when confronted with task of compelling, as did Parliament and the King's Justices of old, finds the matter apparently "too high." *Virginia* v. *West Virginia,* U. S. Supreme Court No. 2 Original, Oct. Term, 1917.

No wonder the court is embarrassed. For the question is one which involves difficulties of theory and policy, and can scarcely be settled by legal principles and rules alone. At least though the case would be clear if between private parties, must not the court consider whether the character of the parties as well as circumstances may alter cases?

The latest move in this extraordinary litigation which has now been before the Supreme Court eight times, is an application by Virginia for process in the nature of mandamus to compel the legislature of West Virginia to exercise its power of taxation to raise money wherewith to pay the judgment, West Virginia having no property subject to execution, unless it be that used for government purposes. There is no express qualification or limitation of the grant of jurisdiction in "controversies between two or more states" to the Supreme Court. Unquestionably a grant of "jurisdiction" includes, in cases between private parties, power not only to adjudicate, but to issue compulsory process to enforce orders, judgments and decrees. *Wayman* v. *Southard,* 10 Wheat, 1, 2, 3; *Bank of U. S.* v. *Halstead,* 10 Wheat, 57; *Please* v. *Rathbun Jones Co.,* 228 Fed. 279; *Knox Co.* v *Aspinwall,* 24 How. 384. But the grant of jurisdiction to the Supreme Court in controversies between states and that in cases between private parties is in the same clause and in language identical in legal significance.

How then can it be claimed that the grant in the first class of cases, is less complete and comprehensive than that in the second? West Virginia answers that it is because, as a State, her governmental powers cannot be controlled or limited. But this position rests upon a theory of complete

sovereignty, and admittedly our states are not completely sovereign. Does the power contended for fall within that portion of the state's sovereignty reserved to it, or is it not rather by the very grant referred to within that portion surrendered to the federal government. There is no express limitation upon this grant of jurisdiction, no modification of the universally conceded legal signification of the term jurisdiction, and none can be implied unless it be by appeal to the character of the parties. But it is singular that in so important a matter as this, the Constitution should delegate power to the federal government by employing, unqualified and unrestricted a legal term of well defined meaning, if in fact it was intended to limit that power to less than the usual significance of the term employed.

There is very little in the records of the constitutional convention or other contemporary material, to throw light upon the question. Chief Justice WHITE'S opinion deals very satisfactorily with this phase of the matter citing Elliott's Debates, and The Federalist, No. 81, as tending to show that "jurisdiction" in its full legal significance was granted to the Court in these controversies. The history of the particular clause of the Constitution involved, may be traced in 1 Farrand, Records of the Federal Convention, 28, 244, 247, 298; 2 ibid. 146, 147, 157, 173, 186, 425, 601.

The fact that during the colonial period differences between the Colonies though determined by a committee of the Privy Council, were enforced either by royal decree or legislation by Parliament is not persuasive, for our entire governmental machinery under English rule was totally different from that existing after the Declaration of Independence. For the omnicompetence of Parliament, there was substituted a distribution of powers, in which the matter in dispute, seems to be definitely assigned to the Supreme Court. See *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 739, et seq. and historical authorities cited in the margin of the opinion in the instant case.

Under the Articles of Confederation (Art. IX) disputes between the states were to be determined by a special commission or court to be appointed in each case by consent if possible, if not by congress, and the judgment, which was to be "final and conclusive," was to be "transmitted to congress, and lodged among the acts of congress for the security of the parties concerned." As was to be expected this bungling method was very unsatisfactory in practice, and the dissatisfaction with the results obtained and the significant omission under the Constitutional scheme of any provision for Congressional participation argue that the intention of the Federal Convention was to give that complete power to the Supreme Court, which the legal meaning of "jurisdiction" implies.

The case of *Kentucky* v. *Dennison*, 24 How. 66, unquestionably lends support to the West Virginia contention; but that case involved a phase of the slavery question which was already a cause of dangerous ferment, and was decided by a court dominated by the extreme states' right theories of Taney, C. J., and four other appointees of President Jackson. From a legal view-point the decision is an indefensible confession of judicial impotence, and while the case has never been overruled, it is perhaps signifi-

cant that in the present opinion the Chief Justice does not so much as refer to it. (See an article by W. C. Coleman, 31 HARV. LAW REV., 210.) It must be admitted that statesmen of our early constitutional period, including such staunch nationalists as Hamilton expressed doubt occasionally as to the power of the federal courts to enforce judgments (See The Federalist, No. 81) but this never became the accepted view of the courts, except perhaps in the unfortunate line of cases just referred to. Over against them must be set the unquestionable shift of the center of power toward the nation, which economic conditions, the Civil War, and the Civil War amendments, have accomplished. It is idle to deny that constitutional law is made in this way.

Finally we have a long line of cases beginning with *New York* v. *Connecticut*, 4 Dall. 1, and running to *Arkansas* v. *Tennessee*, 246 U. S.—in which the jurisdiction over controversies between states was freely exercised. It is true that as the states in all these cases voluntarily gave effect to the judgments, compulsion was not required, but that very fact argues that the court's judgments were regarded as more than mere arbitral pronouncements. In *South Dakota* v. *North Carolina*, 192 U. S. 286, the court clearly asserted its ability to enforce a money judgment against a state, a step, however, which it became unnecessary to take because of subsequent developments. It should be noted, too, that four justices dissented, WHITE, C. J., writing the dissenting opinion. But the latter's opinion in the present case must be taken as greatly modifying, if not a rejection of, his former view.

Moreover in *Van Hoffman* v. *Quincy*, 4 Wall. 535, and many other cases the Supreme Court has not hesitated to approve of the compulsion exercised by the judicial power upon municipalities to enforce the levy of an authorized tax to pay judgments "rendered in consequence of a default in paying the indebtedness." And while the difference between the municipal and the state legislatures must be recognized, never the less the former as well as the latter exercises state governmental power.

While the step asked for by Virginia is opposed by many practical difficulties, and is by no means free of doubt as to the soundness of its legal theory, yet on the whole the wording of the constitutional grant of jurisdiction and the logic of the situation point strongly to the existence of the power claimed. And this seems to be the view of the Court for it declares: "In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said."

The suggestion of the Chief Justice that Congress may have power to enforce the obligation of West Virginia is interesting, but cannot be adequately discussed within the space here available. The basis for such proposed action is the constitutional requirement that agreements between states can be given validity only through the consent of Congress, from which flows a general supervisory power in Congress, which under the doctrine of *McCulloch* v. *Maryland*, 4 Wheat. 316, may be exercised by an appropriate legislation. There is much strength in this position, but in any proposed

legislation for this purpose, care would have to be exercised to avoid interfering with judicial functions, or impairing already vested rights. Perhaps a general law drawn to provide a method of enforcing judgments against states, and confining itself to "remedy," would afford the solution.

H. M. B.

PRIVILEGE OF ENEMY ALIENS TO MAINTAIN ACTIONS.—In his History and Practice of Civil Actions, Lord Chief Baron Gilbert (p. 205) states that alienage is a disability which must be pleaded to the action, "because it is forfeited to the King, as a reprisal for the damages committed by the Dominion in enmity with him. In 1 Hale's Pleas of the Crown, (p. 95) it is said "That by the law of England debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him," Y. B. 19 E 4, 6, is cited to that effect. The provisions of c. 30 of Magna Charta clearly imply that such confiscation was appropriate under the common law. In case the Crown neglected to seize the debts due the alien enemy the creditor was, upon the termination of the state of war, entitled to sue. *Antoine* v. *Morshead,* 6 Taunt. 237.

The severe rule of the common law was early broken into by the courts. In Y. B., 32 Hen. 6, 23 (b) 5, it is indicated that if an enemy alien came into England under the King's permission he could maintain an action in the King's court for the tortious taking of goods from his house. And since *Wells* v. *Williams,* 1 Ld. Raym. 282, 1 Lutw. 35, 1 Salk. 46, the law has been considered as settled that an enemy alien within the realm by permission could maintain actions, the necessities of trade and commerce having mollified the too rigorous rules of the old law and taught the world more humanity. Even a prisoner of war could maintain an action on a contract for services as a sailor. *Sparenburgh* v. *Bannatyne,* 1 Bos. 1 Pul. 163. At least one judge, however, went on the ground that the plaintiff was no longer an alien enemy. The enemy plaintiff must plead his permissive presence. *Sylvester's Case,* 7 Mod. 150. The rule of pleading seems to have been later settled otherwise. *Casseres* v. *Bell,* 8 T. R. 166, holding that the plea must negative the facts which would enable the plaintiff to maintain the action. *Cf. Boulton* v. *Dobree,* 2 Camp. 163. An enemy alien commorant in the enemy country cannot maintain an action. *Le Bret* v. *Papillon,* 4 East 502.

The course of the English law was reviewed in a very learned opinion by Lord Reading, C. J., in *Porter* v. *Freudenberg,* 1915, 1 K. B. 857, where it was held that actions *against* enemy aliens whether resident or commorant in the enemy country are unaffected. In *Schauffenius* v. *Goldberg,* 1916, 1 K. B., 284, it was held that a German subject interned in England could prosecute an action in court. Judge Younger said: "There has been a gradual and progressive modification in the rules of the old law in their restraint and discouragement of aliens. It is, as I have already indicated, not the nationality, but the residence and business domicil of the plaintiff that are now all important. If these are in enemy country a plaintiff may not sue, whatever his nationality, even if he be a friend. If these